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IN THE

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Supreme Court of the United States

OCTOBER TERM, 1960.
No. 187

ELIZABETH ANN DUNCAN,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae

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IN THE

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OCTOBER TERM, 1960

No. 187

ELIZABETH ANN DUNCAN,

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vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The National Lawyers Guild, Los Angeles-Hollywood-Beverly Hills Chapters, respectfully move this Honorable Court for leave to file a brief *amicus curiae* in this case.

The National Lawyers Guild is a national bar association with local chapters, including the Los Angeles-Hollywood-Beverly Hills Chapters, which is concerned with the promotion of justice in the administration of the law and has a special interest in maintaining the

standards of conduct of members of the bar. It is particularly concerned that no unfair action of a member of the bar in his capacity as a prosecuting officer deprive any accused of a trial essentially fair before a tribunal essentially impartial.

Petitioner here appears to have been deprived of a fair trial before an impartial tribunal by publicity statements and releases of a highly inflammatory and biased nature made by the District Attorney of the County in which she was to be tried. The impact of these statements and releases which were carried widely in the press of the County was shown by the *voir dire* of the jury. Instead of a trial before a jury whose minds were open, petitioner was tried by a jury whose attitudes had been bent against her, who were unable to indulge the presumption of innocence and who admittedly would not have wanted their loved ones tried on similar charges before jurors of the same frame of mind.

Without debating the merits of the British *vis-a-vis* the American systems in balancing the right to a free press against the right of an accused to a fair trial, as respects the right of the press to comment on pending litigation, it is evident that the *prosecutor* should not be permitted to use the press for purposes of depriving the accused of a fair trial. Without debating what measures might be taken against a member of the bar who as a prosecutor uses his public office and prestige to prevent the accused from being accorded due process.

it is evident that the right of the accused to a trial which in its essence comports with due process is paramount. Where the prosecutor has so vitriolically compaigned against the accused in pre-trial press releases that a fair trial is improbable, this paramount right demands that the state, the prosecutor's employer, take measures to revitalize the fairness and impartiality of the proceedings.

An examination of the briefs and petitions heretofore filed in this case does not indicate that this question of public importance has been adequately covered by the parties. The National Lawyers Guild, Los Angeles-Hollywood-Beverly Hills Chapters, therefore, asks leave to file the brief herein *amicus curiae*. We are gravely concerned with the issues involved because the maintenance of the meaning and vitality of this very fundamental principle of due process in criminal proceedings is a problem which extends beyond the borders of California and affects the rights of all the criminally accused before all state courts and the federal courts as well.

The National Lawyers Guild as *amicus curiae* has previously filed a brief *amicus curiae* in *Konigsberg v. The State Bar of California and the Committee of Bar Examiners of the State Bar of California*, October Term 1960, No. 28, and *Anastaplo v. The Board of Bar Examiners of the State of Illinois*, October Term 1960, No. 58.

The petitioner has consented to the filing of this brief. The respondent has refused to consent.

Respectfully submitted,

BEN MARGOLIS,

Attorney for Los Angeles-Hollywood-Beverly Hills Chapters National Lawyers Guild, Amicus Curiae.

Of Counsel:

CHARLES B. STEWART, JR.,

HARRIETT BUHAI,

NORMAN G. RUDMAN,

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Respondent.

Brief of the Los Angeles-Hollywood-Beverly Hills Chapters of the National Lawyers Guild (Amicus Curiae on Behalf of Petitioner).

Introduction.

The National Lawyers Guild is a national bar association with local chapters including the Los Angeles-Hollywood-Beverly Hills Chapters, among whose fundamental precepts is the preservation of constitutional liberties and the maintenance and strengthening of elemental concepts of justice and fairness. As an association of lawyers, we are vitally concerned with the professional conduct of members of the bar and the standards by which that conduct must be measured; we are concerned as we must be that all fundamental safeguards of constitutional right and fairness be accorded every citizen, no matter how barbaric the crime charged nor how clear the proof in any given case.

We share with all civilized persons a revulsion at the barbarous brutality of the crime involved in the case under review. We cannot and do not comment upon the quantum or strength of the proof of guilt adduced against petitioner. Our concern is not with her guilt or innocence. It is simply that that guilt or innocence be adjudged only by an impartial tribunal, unsullied by mass passions or public hysteria.

The record at bar makes clear that before petitioner was tried, the District Attorney of Ventura County made numerous inflammatory statements against her to the newspapers, radio, television and the public, which not only declared petitioner's guilt but attempted to prescribe the punishment which should be visited upon her. The *voir dire* of the jury panel abundantly disclosed that the statements reached their mark and that at the time of petitioner's trial it was impossible to find in Ventura County an impartial jury to try her. Timely motions for change of venue were made and repeated but in each instance were denied.

In this setting we are impelled to the conclusion that denial of a change of venue obliterated the possibility of attaining that fair play and fundamental justice which are ingrained in our system of jurisprudence.

To allow the guilt of even the most apparent and abhorrent criminal to be adjudged by a jury whose minds have been closed against the accused before the trial by conduct of the District Attorney is to threaten the shelter of due process which may be erected around the less obvious guilty, and indeed the innocent. Moreover, guilt which is apparent by the half-light of inflamed prejudice may be revealed as unreal in the stead-

ier illumination of the calm and dispassionate judical process.

The public and social importance to our "scheme of ordered liberty" (*Palko v. Connecticut*, 302 U. S. 319, 325) that ". . . no man's life, liberty or property be forfeited as criminal punishment . . . until there had been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement and tyrannical power" (*Chambers v. Florida*, 309 U. S. 227, 236-237), compels us to urge our views. The refusal of the trial court to change venue, despite the atmosphere prejudicial to the accused created by the remarks of the District Attorney prior to both indictment and trial, flouts "the basic principle that all people must stand on an equality before the bar of justice in every American Court." (*Chambers v. Florida, supra* at 241.)

I.

The Fundamental Safeguards of Due Process Rest Upon Broad Grounds of Fair Play. They Are Not to Be Narrowed by Technical Interpretation, nor to Be Sacrificed to Expediency.

It is now beyond argument that it is not sufficient compliance with due process that the laws of a state prescribe rules of just trials or that a particular criminal trial follow prescribed forms. It is further required that this court inquire whether in a particular prosecution the forms of justice have been distorted to accomplish what is in fact a denial of fundamental right. *Moore v. Dempsey*, 261 U. S. 86; see *Monroe v. Pape*, ... U. S. ....., 81 S. Ct. 473, 476-482.

In this prosecution we submit that the trial court's refusal to change venue in the light of the temper of

the community, as reflected in the statements of the jurors of record, offends a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental". *Snyder v. Massachusetts*, 291 U. S. 97, 105. That principle of justice is no more than that the accused might be judged in a trial which in its essence is inherently fair. It not only proscribes but discards the conviction of an accused "whose trial is offensive to the common and fundamental ideas of fairness and right." *Betts v. Brady*, 316 U. S. 455, 473. It disavows satisfaction with expediency or technical conformity to empty forms. It seeks to preserve those principles ". . . so fundamental as to be inherent in every concept of a fair trial". *Snyder v. Massachusetts, supra* at 122. Were ease of obtaining a conviction the motivating force in our system of justice, this court need never have declared that the principles of fair play would be "kept inviolate and inviolable, however crushing may be the pressure of incriminating proof." *Id.*

It is commonplace that society must be protected against the anti-social conduct of individuals and that this protection is the function of the criminal law. It is just as true, however, that convictions based upon trials "repugnant to the conscience of mankind" *(Palko v. Connecticut, supra* at 323), are more destructive than crime itself of the basic notions of our society and that, therefore, the principles of decency and fairness in judicial proceedings have traditionally in our history taken precedence over expediency in obtaining convictions, irrespective of the crime charged.

These deep-going principles have been understood to mean that the government may not use its power to

choose a "tribunal favorable to it" (*United States v. Johnson*, 323 U. S. 273, 275; compare *Travis v. United States*, ... U. S. ....., 81 S. Ct. 352, 360), in order to obtain a conviction. The force of these doctrines is increasingly clear in a case where, as in this one, the tribunal was made hospitable to the attitude of guilt finding by the acts and statements of the prosecuting officer himself. The contrary position would render nugatory this court's repeated pronouncements that the interest of the government in a criminal case is not that it shall win a conviction but that justice shall be done. (*Berger v. United States*, 295 U. S. 78, 88; *Jencks v. United States*, 353 U. S. 657, 668; *Campbell v. United States*, ... U. S. ....., ..., 81 S. Ct. 421, 427.)

II.

Where the Prosecuting Officer, by Public Acts and Statements, Corrupts the Impartiality of the Population From Which the Jury Must Be Drawn, Due Process Demands That Upon Request Seasonably Made the Venue of the Trial Be Changed to a Place Which Can Afford the Accused a Fair Trial.

It has become almost axiomatic that the public prosecutor in the American system of law occupies an anomalous position in the trial of a criminal case. "He is both an advocate, determined to convict the defendant, and a representative of the state, safe-guarding the rights of all, including the defendant." (*United States v. Rosenberg*, 344 U. S. 838.) It is as much his duty to see that the accused is not deprived of any of his rights as it is to prosecute. He may strike hard blows but he is not at liberty to strike foul ones, or to use

improper methods. *(Berger v. United States, supra.)* What appears with clarity and force is that in his representation of *all* of the people of his jurisdiction, including the accused, the prosecutor owes a duty to act for the benefit of the public and that while the procurement of a conviction for crime may benefit the public, procurement of a conviction by unfair and improper means does not.

It is not our purpose to speculate as to the motives which prompted the prosecutor herein to pre-try his case in the press. Whether his acts were prompted by a passionate disgust for the crime of which he believed the accused guilty, by a hunger for publicity for personal or political reasons, by a desire to rebut a burgeoning movement in California for the abolition of capital punishment or by some other motive is of no moment. Nor is it our purpose to propose devices for the censure of the too-zealous prosecutor.

We do urge that from the prosecutor's sowing of the seeds of hatred for the accused blooms a fruit which must be harvested by the public whom he represents.

We believe it clearly demonstrated that the effect of the prosecutor's statements was to prejudice the overwhelming number of persons available to serve as jurors in this case. Certainly his inflammatory remarks were calculated to and did in fact at the minimum create an unwholesome atmosphere in which a fair trial was improbable. This conclusion is particularly forceful in a capital case where the jury not only must determine the guilt or innocence of the accused but must also determine whether the defendant shall be imprisoned or executed.

What then are the alternatives? Two choices immediately suggest themselves as reasonable in securing a fair and impartial trial for the accused without doing violence to the administration of the criminal law: continuance or change of venue.

But the principles underlying either method of safeguarding the right to trial before an impartial tribunal would seem the same.

In *Stroble v. California* (343 U. S. 181), a conviction was affirmed although the petitioner urged before this court that he had been prejudiced by the prosecution's publicity. However, the facts upon which the affirmance turned were that change of venue had not been seasonably demanded and petitioner there had made no showing that the publicity had prejudiced the jury; and the implication of the opinion seems clear that where a similar fact situation exists and the prejudice is shown, upon demand seasonably made, change of venue should be granted. This brings us to the *Duncan* case. Here, where the accused made several timely requests, there would appear no reason why the entire court should not join with the principles enunciated by Mr. Justice Frankfurter, dissenting in the *Stroble* case:

> ". . . [I]f guilt here is clear the dignity of the law would be enhanced by establishing that guilt wholly through the processes of law, unaided by the infusion of extraneous passion. The moral health of the community is strengthened by according even the most miserable and pathetic criminal those rights which the Constitution has designed for all." (343 U. S. at 202.)

In *United States v. Montgomery* (42 F. 2d 254), the court stated:

> "Articles appearing in the public press may sometimes prevent a fair trial and in such case the judge should have no alternative but to grant a new trial."

And in *Delaney v. United States* (199 F. 2d 107), the court in reversing a denial of a motion for continuance said, *inter alia,* that

> "Many grounds for appeal have been urged on this appeal. But perhaps the strongest point, the one placed first and foremost, and most seriously and earnestly relied upon by appellant, is that the trial judge committed error in not granting a continuance of the trial for a longer period, until such time as it could be estimated with greater assurance that the prejudicial effect of the aforesaid publicity in the newspapers and magazines over the radio and on television, had so worn off that the trial could proceed free of the enveloping hostile atmosphere and public preconception of guilt prevalent on January 3, 1952 when appellant was brought to trial."

In *People v. Talle* (111 Cal. App. 2d 650, 678), the court in a reversal based on the misconduct of the District Attorney said:

> ". . . [P]rosecutive zeal . . . is not a substitute for the orderly, lawful and constitutional processes and guarantees. . . . [P]rosecuting officials have no right to weaken those and other

> protective constitutional devices. . . . [C]onstitutional guarantees are not arbitrary pronouncements adopted to protect the guilty, and to make it difficult for hard working prosecutors. They are the result of struggle in fighting hundreds of years of governmental oppressions. They are necessary to protect the innocent. If an accused, even a guilty accused, cannot be convicted except by a violation of these principles, then he should not and cannot be lawfully convicted."

We deem it clearly shown that the remarks and pretrial activity of the prosecutor made it more than dubious that the petitioner would be accorded a fair trial in Ventura County, California in early 1959. Certainly it is to be expected that in another county where the published remarks of Ventura County's leading elected official had not saturated the press, a more impartial jury, if only more impartial on the question of punishment, would likely have been found. While it is conceivable that in trying the action in another county some additional burden and expense may have accrued to the prosecutor and the state, such factors are certainly trivial when weighed in the balance against the accused's right to a fair and impartial trial in a capital case. To the extent that this added expense and effort is deemed important by the public, its concern may awaken in it the demand for greater restraint by its public prosecutor's and greater deference to the sacred safeguards of fair and constitutional procedure.

The prosecutor is after all the public's elected representative. He and the public must share the blame with the press when his press releases turn the criminal process into a Roman holiday. He is not merely a jurisprudential gladiator, dedicated to victory at all costs. Rather in his occupancy of the key position as the representative of the public he controls to a large extent the whole scene and atmosphere of a criminal trial. He has at hand, if he cares to use it, a lethal weapon for foul play conferred upon him when he takes his oath of office. But he must not use it, for "when prejudice and vindictiveness are built up through weeks or months of carefully slanted news and feature stories, the confidence of the courts themselves and their own ability to mete out even-handed justice is sometimes shaken." *Berge, the Prosecutor and Crime Publicity,* 29 A. B. A. J. 63.

It is impossible for the state on the one hand to guarantee the accused a fair and impartial trial and on the other to allow its evidence to be offered by its own representative in other than a fair and impartial manner. If it has developed that through an excess of zeal the state's representative has prejudiced the rights of the accused, the state must take measures, though they be expensive or convenient to restore the balance.

> "Due process of law, preserved by law by our constitution, commands that no such practice as disclosed by this record shall send any accused to his death. No higher duty, no more solemn re-

sponsibility, rests upon this court than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of any human being subject to our constitution." *Chambers v. Florida, supra* at 241.

Respectfully submitted,

BEN MARGOLIS,

Attorney for Los Angeles-Hollywood-Beverly Hills Chapters National Lawyers Guild, Amicus Curiae.

Of Counsel:

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